

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 7TH DECEMBER 2007 / 16TH AGRAHAYANA 1929

SA.No. 256 of 1993(E)

**AS.223/1991 of IIND ADDL.SUB COURT, THALASSERY
OS.39/1989 of ADDL.MUNSIFF COURT, KANNUR**
.....

APPELLANT- APPELLANT-2ND RESPONDENT-2ND DEFENDANT

**KOLAPRAM BHASKARAN, S/O. RAMAN,
KOLAPRAM HOUSE, EAST OF SREE
SUNDARESWARA KSHETHRAM,
TALAP, KANNUR.**

***ADDL.APPELLANTS 2 TO 5 IMPEADED**

- 2. RADHA BAHASKAR W/O. LATE BHASKARAN,
AGED 70 YEARS.**
- 3. THEJOMAYAN, S/O. LATE BHASKARAN,
AGED 37 YEARS.**
- 4. SUNDARESWARAN, S/O . LATE BHASKARAN
AGED 31 YEARS.**
- 5. RAJARATNAM, S/O. LATE BHASKARAN,
AGED 29 YEARS.**

**PETITIONERS NO. 2 TO 5 RESIDING AT KOLAPRAM HOUSE,
P.O. TALAP, KANNUR.**

**ADDL. APPELLANTS 2 TO 5 IMPEADED AS THE LR'S OF DECEASED
APPELLANT AS PER ORDER DT. 13.2.06 IN IA. 338/06.**

**BY ADV. SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA**

SA. NO.256/1993

**RESPONDENTS-PETITIONERS & RESPONDENT NO.1-PLAINTIFF
----- NOS. 2 TO 6 AND IST DEFENDANT**

- 1. THANKAMMA GOPAL, S/O. GOPALAN, HOUSE
WIFE, 114, 18TH CROSS LAKSHMIPURAM,
ULLOOR, BANGLORE, 560008.**
- 2. GIRISH GOPAL, SALES CLERK, DO. DO.**
- 3. SHEELA GOPAL, D/O GOPAL, DATA ENTRY
OPERATOR IN BANK, DO. DO.**
- 4. SHOBHA GOPAL, 58/4, 6TH CROSS AGNAYAPPA BLOCK
BENSOM TOWN , CROSS M.P. PALAYAM BANGALORE 46.**
- 5. SATISH GOPAL, TRAINEE CLERK,
EASTERN SPINNING MILLS,
9/1 R.N. MUKERJEE ROAD, 14TH FLOOR,
BIRLA BUILDING CULCUTTA, 700001.**
- *6 KOLAPRAM KUMARAN, S/O. RAMAN , 47 INFANTRY ROAD,
BANGALORE. (DIED)**

ADDL. R7 IMPEADED.

- 7. M.K.AJITHKUMAR, S/O. M.P.GOPALAN,
KANNAVILA, CANNANORE.**

**THE ABOVE RESPONDENT IS IMPEADED AS ADDL. 7TH RESPONDENT
AS PER ORDER DT. 25.2.03 IN CMP. 169/0.3.**

ADDL.R6 DIED ADDL. R8 IMPEADED

- 8. PADMINI KUMARAN, AGED 70 YEARS 47,
INFANTRY ROAD, BANGALORE.**

**ADDL. R8 IS IMPEADED AS THE LR'S OF DECEASED 6TH
RESPONDENT IN SA. AS PER ORDER DT. 1.12.07 ON CMP. 1167/95.**

**BY ADV. SRI.GOVINDH.K.BHARATHAN, N.MADHAVAN - R2
SRI.P.V.JYOTHI PRASAD - R6, R8**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 07/12/2007,THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

M.SASIDHARAN NAMBIAR, J.

.....
S.A.No. 256 OF 1993
.....

DATED THIS THE 7th DAY OF DECEMBER, 2007

JUDGMENT

Second defendant in O.S.39 of 1999 on the file of Munsiff Court, Kannur is the appellant. On the death of appellant, additional appellants 2 to 5 were impleaded as his legal heirs. Respondents 1 to 5 were subsequently impleaded as legal heirs of original plaintiff. 6th respondent is the first defendant. On the death of 6th respondent, additional 8th respondent was impleaded as his only legal heir. 7th respondent got himself impleaded as an assignee from 8th respondent. As per the preliminary decree dated 30.10.1989, plaint schedule properties, consisting of two items, were found to be available for partition and directed to be divided into three equal shares and for allotment of one share each to plaintiff and defendants 1 and 2. I.A.754 of 1990 was filed for passing a final decree in accordance with the preliminary decree. As per the final judgment dated 12.4.1991, a final decree was passed in accordance with Ext.C8 and C9 plan accepting the allotment as provided under Exts.C6 share list. Consequently owelty was directed to be paid in accordance with Ext.C6 share list. Under the final decree so passed,

respondents 1 to 5, the legal heirs of original plaintiff were allotted plot A in Ext.C8 plan and plot A in Ext.C9 plan. First defendant was allotted plot C respectively in Ext.C8 and C9 plans. Second defendant was allotted respectively plots B in Ext.C8 and C9 plan. Contending that allotment of shares are not equitable, appellant second defendant filed A.S.223 of 1991. Learned Sub Judge found that plot A in Ext.C8 plan is adjacent to plot B in Ext.C9 plan allotted to the appellant and in such circumstances, it should have been allotted to appellant instead of plot B in Ext.C8 plan. Learned Sub Judge therefore accepted Ext.C7 share list instead of Ext.C6 share list accepted by trial court. Appeal was allowed and a final decree was modified in accordance with Ext.C7 share list and allotment. This appeal is filed challenging the said modified final decree contending that after accepting Ext.C7 share list, first appellate court wrongly directed the payment of original owelty amount itself as directed by the trial court accepting Ext.C6 share list and it is illegal and is to be set aside.

2. Second appeal was admitted formulating the following substantial questions of law.

1)When the lower appellate court accepting the alternative share

list submitted by the Commissioner, allotted the properties as per the alternate share list, is the lower appellate court legally right in ordering payment of owelty amount as provided in the original share list.

3. Learned counsel appearing for appellant was heard. Though the question involved in the appeal cannot strictly be termed as a substantial question of law, as the appeal has already been admitted on this question of law and as first appellate court committed an error in accepting Ext.C7 share list and directing payment of owelty amount as provided under Ext.C6 share list and it is found illegal, it is necessary to modify the final decree in the second appeal itself without directing parties to approach the first appellate court to correct the error.

4. It is clear from the final decree passed by the trial court that the final decree was passed accepting the allotment made under Ext.C6 share list. First appellate court found that the allotment should not have been done as provided under Ext.C6 and instead should have been done as provided under Ext.C7 share list. It is for that reason, the decree was modified accepting Ext.C7 share list. By doing so, first appellate court allotted plot A of Ext.C8 plan, to the second defendant instead of

plot B in Ext.C8 plan. So also though trial court allotted plot A in Ext.C8 plan to the plaintiff, in view of the allotment of that plot to the second defendant, first appellate court allotted plot B in Ext.C9 plan instead of plot A in Ext.C8 which was originally allotted. By modifying the final decree, plaintiff was allotted plot C8 and C9 in Ext.C9 plan and second defendant, plot A and B in Ext.C8 plan. Unfortunately, while modifying that decree, first appellate court omitted to take note of the difference in the share value and the consequential payment of difference in owelty amount payable by second defendant towards equalisation of shares. As per the modified allotment, instead of Rs.51815.51 being the share value of one sharer, plaintiff was allotted plots A and B in Ext.C9 plan, having a total value of Rs.37915. Therefore, as per the modified allotment, instead of original owelty amount of Rs.22151.51, legal heirs of the original plaintiff are only entitled to get owelty amount of Rs.13900.51. Without noting this aspect, in the modified final decree, appellant was directed to pay Rs.22,163.51, as provided originally by the trial court in accordance with Ext.C6 share list. It is erroneous and is to be modified. There is no change either in the allotment of shares or owelty amount payable to the first

defendant.

5. Appeal is therefore allowed in part. The final decree passed by Sub Court, Thalassery in A.S.223 of 1991 is modified with regard to the owelty amount payable by second defendant as follows.

6. Second respondent/second defendant shall also pay Rs.13,900.51 to petitioners 2 to 6 and Rs.13,346.41 to first defendant for the purpose of equilisation of share value and plots A and B in Ext.C8 plan allotted to second defendant/second respondent will be a charge for the said amount.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-